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Don D. Chamberlain et al v. Arthur Montgomery, James W. Gough and Edwin Over : Brief of Respondents

Utah Supreme Court

Senior & Senior; Charles Welch, Jr.; Francis M. Gibbons; Attorneys for Respondents;

Case No. 7934

IN THE SUPREME COURT
of the
STATE OF UTAH

DON D. CHAMBERLAIN,
Appellant,

vs.

ARTHUR W. MONTGOMERY, JAMES W. GOUGH, and EDWIN OVER,
Respondents.

BRIEF OF RESPONDENTS

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BRIEF OF RESPONDENTS

STATEMENT OF THE CASE

A Statement of the Case is made herein on account of the argumentative matter contained in Appellant's Statement of Facts and for the purpose of setting out the case background for the convenience of this Court.

This appeal is from a Decree and Judgment of the Fourth Judicial District Court in and for the County of Utah, State of Utah, in favor of Defendants (Respondents herein) and against Plaintiffs Don D. Chamberlain,

Jeannette T. Chamberlain individually, and Jeannette T. Chamberlain as Administratrix of the Estate of J. H. Chamberlain, deceased. (Don D. Chamberlain, Appellant herein, is the only Plaintiff who appealed from the Decree and Judgment of the Trial Court.) Defendants will hereinafter be referred to as Respondents, and Plaintiff Don D. Chamberlain will hereinafter be referred to as Appellant.

The land in question is mineral in character and is situated in Camp Floyd Mining District, Utah County, State of Utah (R. p. 30). The mineral for which said property is valuable is verascite, which is a mineral not widely found. Specimens of verascite are in demand by mineral collectors, universities and museums.

On May 29, 1937, Arthur W. Montgomery and Edwin Over located the Little Green Monster Lode Mining Claim, which covers the land in question, in full compliance with the mining laws of the United States and of the State of Utah (R. p. 30). Respondents Arthur W. Montgomery and Edwin Over conveyed by Quit-Claim Deed to Respondent James W. Gough an undivided one-third (⅓) interest in and to the Little Green Monster claim on November 13, 1944 (R. p. 31).

On July 2, 1941, James H. Chamberlain, predecessor in interest of Appellant, entered upon the Little Green Monster Lode Mining Claim and attempted to relocate upon and over said claim the Green Gem Lode Mining Claim (R. p. 31).

On June 22, 1948, Respondents, without waiver of any previous rights, made an amended location of the Little Green Monster Lode Mining Claim for the purpose of more definitely describing the boundaries of the claim by specific courses and distances (R. pp. 31, 32). Thereafter, Respondents caused their Little Green Monster Lode Mining Claim to be surveyed for patent, which survey is identified as Utah Mineral Survey No. 7207.

On or about December 1, 1950, Respondents filed in the Land and Survey Office, Bureau of Land Management, Salt Lake City, Utah, their Application for a United States Patent for the Little Green Monster Lode Mining Claim (R. p. 32).

On January 29, 1951, Appellant, as claimant of the purported Green Gem Lode Mining Claim, filed with the Land and Survey Office, Salt Lake City, Utah, an adverse claim against Respondents' Application for Mineral Patent and later commenced suit in the Fourth Judicial District Court to determine such adverse claim and the right of possession to the land embraced in the Little Green Monster Lode Mining Claim (R. p. 32).

The theory on which Appellant brought the suit to determine his adverse claim was the alleged failure of Respondents Arthur W. Montgomery and Edwin Over to perform the annual assessment labor of $100.00 upon the Little Green Monster Lode Mining Claim for the assessment year commencing July 1, 1940, and ending July 1, 1941, and the alleged forfeiture of the Little Green

Monster Lode Mining Claim by virtue of the asserted relocation of the ground by Appellant's predecessor in interest on July 2, 1941.

The main issue of fact formulated by the pre-trial order, and the only one which Appellant raises on this appeal, is "Was the assessment work under the 'Little Green Monster Lode Mining Claim' actually done for the year beginning July 1, 1940, and ending July 1, 1941?" (R. p. 25). (This assessment year is hereinafter for convenience sometimes referred to as the "assessment year in question".)

The case came on for trial before the Court, without a jury, on September 4, 1952. The Court, after hearing and duly considering all the evidence presented, made its Findings of Fact and Conclusions of Law, which included as Finding of Fact No. V the following:

> "That during the assessment year beginning at 12 o'clock meridian on the 1st day of July, 1940, and ending at 12 o'clock meridian on the 1st day of July, 1941, James W. Gough, at the request and for and in behalf of Arthur W. Montgomery and Edwin Over, the then owners of the Little Green Monster lode mining claim, performed labor upon and for the benefit of said claim of a value in excess of One Hundred Dollars ($100.00), in full compliance with the mining laws of the United States and of the State of Utah." (R. p. 31).

and as Conclusion of Law No. III, the following:

> "That at the time of the purported location of said Green Gem lode mining claim, to-wit, on July

> 2, 1941, the ground embraced within said prior and valid Little Green Monster lode mining claim, was not open to re-location, and that said J. H. Chamberlain, locator of said purported Green Gem lode mining location, did not initiate any right, title or interest in or to said premises." (R. p. 33).

Later, the Court entered its Decree and Judgment in favor of Defendants and against Plaintiffs, which, among other things, provided:

> "IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED, that Defendants are the owners, subject only to the paramount title of the United States, in possession and entitled to the possession of the Little Green Monster lode mining claim, as amended, Mineral Survey No. 7207, Utah, which property is located in the Camp Floyd Mining District, Utah County, State of Utah * * *. * * *
>
> "IT IS FURTHER ORDERED, ADJUDGED AND DECREED that neither the Plaintiffs nor any of them, nor any person or persons claiming under or through said Plaintiffs or any of them, have any right, title, claim or interest whatsoever in or to the premises covered by said Little Green Monster lode mining claim, or any portion or portions thereof." (R. p. 36).

Appellant took this appeal from said Decree and Judgment (R. p. 38).

In support of their contention that the Findings of Fact and Conclusions of Law and the Decree and Judg-

ment of the Trial Court should be affirmed, Respondents submit the following points:

STATEMENT OF POINTS

POINT I

THE REQUIRED ASSESSMENT WORK ON THE LITTLE GREEN MONSTER LODE MINING CLAIM FOR THE ASSESSMENT YEAR COMMENCING JULY 1, 1940, AND ENDING JULY 1, 1941, WAS PERFORMED IN COMPLIANCE WITH LAW AND IN GOOD FAITH.

POINT II

APPELLANT HAD THE BURDEN OF ESTABLISHING, BY CLEAR AND CONVINCING EVIDENCE, THAT THE ASSESSMENT LABOR OR WORK FOR THE ASSESSMENT YEAR IN QUESTION WAS NOT PERFORMED ON THE LITTLE GREEN MONSTER LODE MINING CLAIM. APPELLANT DID NOT SUSTAIN THIS BURDEN OF PROOF.

POINT III

THE FINDING OF THE TRIAL COURT THAT THE ASSESSMENT WORK FOR THE ASSESSMENT YEAR IN QUESTION WAS PERFORMED ON THE LITTLE GREEN MONSTER LODE MINING CLAIM IN FULL COMPLIANCE WITH THE MINING LAWS SHOULD NOT BE DISTURBED UNLESS SUCH FINDING IS MANIFESTLY AGAINST THE WEIGHT OF THE EVIDENCE. THE WEIGHT OF THE EVIDENCE IN THIS CASE SUSTAINS RESPONDENTS' CONTENTION THAT THE WORK WAS SO PERFORMED.

POINT IV

THE ARGUMENTS MADE BY APPELLANT IN HIS BRIEF ARE NOT BASED UPON LAW, FACT OR REASON.

ARGUMENT

POINT I

THE REQUIRED ASSESSMENT WORK ON THE LITTLE GREEN MONSTER LODE MINING CLAIM FOR THE ASSESSMENT YEAR COMMENCING JULY 1, 1940, AND ENDING JULY 1, 1941, WAS PERFORMED IN COMPLIANCE WITH LAW AND IN GOOD FAITH.

Title 30 U.S.C.A., Section 28 of the Mining Laws of the United States, provides in part as follows:

> "* * * On each claim located after the 10th day of May, 1872, and after a patent has been issued therefor, not less than $100.00 worth of labor shall be performed or improvements made during each year * * *".

The question of whether or not the above quoted portion of Title 30 U.S.C.A., Section 28, has been complied with, depends on whether or not the locators of the Little Green Monster Lode Mining Claim caused at least $100.00 worth of labor or improvements to be performed upon said claim during the assessment year in question.

It is Respondents' contention that the weight of the evidence proves that more than $100.00 worth of labor or work was performed on the Little Green Monster Lode Mining Claim during the assessment year in question. It is Respondents' further contention that this work properly constituted assessment work within the meaning of said Section 28, Title 30 U.S.C.A., and that, accordingly, the ground embraced in the Little Green Monster Lode Mining Claim was not open to relocation on July 2,

1941, when Appellant's predecessor in interest made his attempted relocation over the Little Green Monster Lode Mining Claim of Respondents.

James W. Gough testified that Respondents Arthur W. Montgomery and Edwin Over requested him to perform the assessment work on the Little Green Monster Lode Mining Claim for the assessment year in question (R. p. 124, lines 9, 10). Pursuant to this request, James W. Gough, in the spring of 1941, made several trips to the Little Green Monster Lode Mining Claim to perform this work (R. 125, lines 1, 2). On some of these trips, James W. Gough was accompanied by his son Gale Gough, and on others he was accompanied by Bernard Welsh. On these occasions, James W. Gough and his assistant, Gale Gough or Bernard Welsh, would leave Mr. Gough's home in Lehi, Utah, about 7:30 a.m. (R. p. 136, lines 19, 20) to travel to the mine, which usually took about an hour (R. p. 136, lines 5, 6, 7), and then would work steadily through the day and sometimes into the night, only taking time out for lunch (R. p. 136, lines 27, 28). The parties would return home after dark, and on one occasion did not return home until 11:30 p.m. (R. p. 136, line 24).

Except for one day's work spent by Gale Gough cleaning out the entrance to the tunnel (R. p. 127, lines 1, 2; R. p. 162, lines 27, 28), all the work performed during the assessment year in question was performed in what was called the "old workings" of the mine (R. p. 129, lines 14, 15). These so-called "old workings" are not

shown on Plaintiffs' Exhibit "C", which was prepared by Junius J. Hayes, Appellant's main witness. The entrance to these "old workings" was located about fifty feet from the point where the right-hand drift joins the main tunnel (R. p. 130, lines 8, 9, 10).

The stope in the "old workings" where most of the work for the assessment year in question was performed, was reached by moving and shifting the muck which closed the entrance to the "old workings" and by crawling over the top (R. p. 130, lines 12, 13, 14, 15). Each day after performing work in the stope in the "old workings", James W. Gough and his assistant shoveled the muck back in place. This was necessary because trespassers had broken down the barrier protecting the entrance to the mine (R. p. 63, lines 23, 25), and the owner knew that trespassers were in search of the verascite (Defendants' Exhibit "3"). Respondents' last form of protection was to conceal the workings as much as possible where the verascite was found, and, as Mr. Gough testified, the opening into the "old workings" was covered each night "so nobody could find those nodules." (R. p. 130, lines 22, 23).

The work done in the stope in the "old workings" consisted of moving two hundred cubic feet of earth and three hundred cubic feet of rock during the completion of digging twenty-five feet of incline raise with a face of about four by five feet (R. p. 134, lines 15, 16). This work was accomplished by blasting and by the use of pick and shovel (R. p. 132, lines 15, 16). The muck loosened by

the blasting was backfilled or gobbed into an open portion of the stope where the work was done and down into the raise (R. p. 133, lines 9, 10, 11, 12). In the course of performing this work, two hundred pounds of verascite nodules were recovered by Respondent James W. Gough (R. p. 135, line 1).

Job H. Winwood, a witness for Respondents, testified that he was a United States Mineral Surveyor, mining engineer and operator, and that in those capacities it became necessary for him to estimate the value of work and labor performed upon mining claims. He testifies that the reasonable value of the work performed by James W. Gough, Gale Gough and Bernard Welsh as assessment work on the Little Green Monster Lode Mining Claim for the assessment year in question was between $180.00 and $190.00 (R. p. 172, lines 15 to 18).

On July 9, 1941, Arthur W. Montgomery acknowledged that the assessment work had been performed by Mr. Gough and gave directions for shipping the verascite nodules which had been recovered (See Defendants' Exhibit "3").

This testimony of Respondents' witnesses, showing that more than $100.00 worth of labor was performed on the Little Green Monster Lode Mining Claim during the assessment year in question, was uncontradicted by Appellant's witnesses. In fact, the only testimony given by Appellant's witnesses in attempting to show that the work for the assessment year in question had not been

done was the negative testimony that they had not seen the development (R. p. 93, lines 10, 11). Appellant's main witness, Junius J. Hayes, was not even aware of the existence of the "old workings". This lack of knowledge of the extent of development on the Little Green Monster Lode Mining Claim appears from his testimony (R. p. 181, lines 7, 16, 28, 30), and from the fact that said "old workings" are not shown on the survey of tunnel, Plaintiffs' Exhibit "C", which was prepared by Mr. Hayes.

On the other hand, Appellant's witness John Hutchings knew of the "old workings" and testified with respect thereto. He stated that "there was no secret about it" (R. p. 173, line 25), and that that was where the best nodules were found. He said, "people that fooled around in the front got little white nodules, but back in there, they were good, at that raise." (R. p. 177, lines 19, 20, 21).

Respondents' affirmative proof that the assessment work was done for the assessment year in question consisted of:

(a) The Affidavit of Work Done, executed and recorded with the County Recorder of Utah County immediately after the work was completed in 1941 (Defendants' Exhibit "1", p. 5);

(b) A letter dated July 9, 1941 (Defendants' Exhibit "3"), from Respondent Arthur W. Montgomery to James W. Gough, acknowledging receipt of a letter from Gough dated June 18, and expressing appreciation for the work done on the verascite claim;

(c) The uncontradicted and positive testimony of James W. Gough, Gale Gough and Bernard Welsh, the men who performed the work and who described in detail the time and manner in which the work was accomplished; and

(d) The corroborating testimony of Job H. Winwood, a mining expert, that the value of the assessment work so performed was in excess of $100.00.

It is submitted that the work performed on the Little Green Monster Lode Mining Claim during the assessment year in question was of a character which constituted assessment labor. The Courts have given a liberal construction to Section 28 of Title 30 U.S.C.A. in determining what character of work satisfies its requirements.

In *Utah Standard Mining Co. v. Tintic Indian Chief Mining & Milling Co. et al.*, 274 P. 950 (Utah 1929), the Court quoted with approval from Volume I of Snyder on Mines, Section 498, page 470, as follows:

> " 'The labor required by the statute may be performed on or off a claim or group of claims so that it tends to develop and to facilitate the extraction of ore, and may consist in any act or work necessary for that purpose, whether it be the running of a tunnel, sinking a shaft, constructing a road in certain cases, the constructing a ditch to convey water or carry off debris, or in short any act, work or improvement which will in its natural and obvious effect enhance the value of the claim and tend towards its development and facilitate the extraction of the minerals it contains.' "

In *Wailes v. Davies et al.*, 158 Fed. 667, affirmed 1908, 164 Fed. 397 (Nevada), the Court in commenting on the character of labor which would satisfy the requirement of the statute, stated:

> "The statute does not require any particular character of labor; it does not require that the work shall be wisely and judiciously done; nor does it say how the work shall be performed. The fact is, the better the mine, the greater the portion of labor which is devoted exclusively to the extraction of ore; and the ideal mine is one in which no prospecting or development work is necessary, where no work is required except the extraction of ore, and the depletion of the treasure, which is the sole value of the mine. *If $100 worth of labor in the nature of mining is performed on a claim by the owner, whether the work is beneficial or not, there can be no forfeiture. The character of labor becomes material when it is performed without the boundaries of the claim.* In that event, the labor must tend to the development or improvement of the mining claim for which it is designed, otherwise it will not count." (Italics ours)

And on the same question, it is stated in *Wigand v. Byrne's Unknown Heirs et al.*, 24 Fed. 2d 179 (1928):

> "It is held that the statute should be given a liberal construction, McCulloch v. Murphy, 125 Fed. 147, and we find no case that holds that $100 worth of work done on a placer mining claim in good faith, in the belief that it will result in the development or improvement of the claim, is to be held insufficient for the reason that it is ill-advised, or does not in fact result in perceptible im-

> provement or development. On the contrary, it is held that the character of the work performed becomes material only when it is performed for the benefit of the claim but on land without its boundaries. In that event the labor must tend to the development or improvement of the mining claim for which it is designed."

In the light of these decisions, it is submitted that the $180.00 or $190.00 worth of work performed upon the Little Green Monster Lode Mining Claim during the assessment year in question, which consisted of twenty-five feet of incline raise and adjacent stoping during the course of which 200 pounds of verascite nodules were recovered, constituted proper and valid assessment work.

Appellant asserts in his brief that the labor performed upon the Little Green Monster Lode Mining Claim during the assessment year in question "does not fulfill the good faith which is inherent in mining law." (App. Br. p. 4).

Respondents recognize that labor must be done in good faith, and submit that the labor performed on the Little Green Monster Lode Mining Claim satisfied every requirement of good faith. The fact that at least $100.00 in assessment labor was performed by the owners upon said claim during the assessment year in question is sufficient evidence of that good faith. See *Haws v. Victoria Copper Mining Company,* 16 S. Ct. 282 (Utah 1895).

That case involved the conflicting claims of a prior and subsequent locator of certain mining property. The

Supreme Court of the Territory of Utah, affirming the trial court, held for the prior locator. One of the grounds of appeal to the United States Supreme Court was that the trial court erred in admitting evidence of the amount of money expended by the prior locator in working the mine. This testimony was presented by the prior locator for the purpose of showing good faith in working the property. As to this ground of appeal, the United States Supreme Court and the Supreme Court of the Territory of Utah held that such evidence was competent in view of the statute requiring that $100.00 worth of assessment work be performed upon each claim annually.

The quotation from *Chambers v. Harrington,* 111 U.S. 350, 4 S. Ct. Rep. 428, 28 L. Ed. 452, cited at page 6 of Appellant's brief, illustrates the principle announced by the Haws case, supra, i.e., that evidence of the performance of labor on a claim is admissible to prove good faith in working the property. That quotation is:

> "Clearly the purpose was *** to require every person who asserted an exclusive right to his discovery or claim to expend something of labor or value on it *as evidence of his good faith* ***." (Italics ours)

This quotation affirms the rule that the evidence of good faith required is the performance of at least $100.00 worth of labor on the claim.

In the instant case, the evidence clearly shows that approximately $180.00 to $190.00 worth of labor was performed upon the Little Green Monster Lode Mining

Claim during the assessment year in question. Under the authority of the above cited cases, this fact is the evidence of good faith of the locator or locators which is required by law.

The reasoning underlying Appellant's contention that the labor performed on the Little Green Monster Lode Mining Claim during the assessment year in question was not performed in good faith is difficult of comprehension, and Appellant's brief contains nothing to clarify his position. The use of the words "questionable performance" of assessment work at page 4 of his brief suggests the implication that Appellant may base his contention, in part, on the argument that at least $100.00 worth of labor was not performed on the Little Green Monster Lode Mining Claim during the assessment year in question. If this is the position of Appellant, it is not well taken for the record shows that far in excess of $100.00 in labor was performed on the Little Green Monster Lode Mining Claim during the assessment year in question.

The only other possible basis of Appellant's argument as to good faith is that the $180.00 or $190.00 worth of labor which the record clearly shows was performed on the Little Green Monster Lode Mining Claim during the assessment year in question, does not satisfy the requirement of good faith because it was performed in the "old workings" of the mine and that Appellant's witnesses did not see where the work was performed. But this does not show a lack of good faith on the part of

Respondents in complying with the law regarding the performance of assessment work because, as is shown above, the law was complied with in every respect. What could be more clear evidence of good faith than the fact that the work was done on the claim at the instance and request of the owners for the purpose of holding the claim, was performed within the time allowed, and was work of a character which satisfied the requirements of law as assessment work?

Respondents not only exercised good faith in doing the assessment work, but demonstrated good judgment in concealing the ore body where the verascite nodules were found from trespassers, claim jumpers and ore thieves. The facts justifying Respondents' fears, and the necessity of concealing the workings where the assessment work was done, abundantly appears from the record which shows that two of Appellant's witnesses admitted to trespassing upon the Little Green Monster Lode Mining Claim and of taking ore therefrom without authority from the owners (R. p. 78, lines 19, 20, 21, 29, 30; R. p. 106, lines 5, 6), and that many other persons had been in the habit of trespassing thereon at will (R. p. 106, lines 5, 6).

Respondents do not see any more logic in Appellant's argument that a forfeiture should be declared against them because they took the precaution to protect their treasure from thieves, than in the argument that a jeweler should be required to forfeit his gems because he locks them in a safe at night.

Section 40-1-6, U.C.A., 1953, of the mining laws of the State of Utah, provides:

> "Affidavit of work done.—The owner of any quartz lode or placer mining claim who shall do or make, or cause to be done or made, the annual labor or improvements required by the laws of the United States, in order to prevent a forfeiture of the claim must, within thirty days after the completion of such work or improvements, file in the office of the county recorder of the county in which such claim is located his affidavit, or affidavits of the persons who performed or directed such labor or made or directed such improvements, showing:
>
> "(1) The name of the claim and where situated.
>
> "(2) The number of days' work done and the character and value of the improvements placed thereon.
>
> "(3) The date or dates of performing such labor and making such improvements, and number of cubic feet of earth or rock removed.
>
> "(4) At whose instance or request such work was done or improvements made.
>
> "(5) The actual amount paid for such labor and improvements, and by whom paid.
>
> "(6) That the notices were posted as required by section 40-1-5.
>
> "Such affidavits, or duly certified copies thereof, shall be prima facie evidence of the facts therein stated."

On May 13, 1941, James W. Gough filed an affidavit of the work done on said Little Green Monster Lode Mining Claim during the assessment year in question (R. p. 125, line 27). This affidavit substantially complied with said code provision.

It is true that a discrepancy appears in said affidavit in that it was filed on May 13, 1941, yet it states that the assessment work was performed between April 8, 1941, and June 1, 1941 (not June 30, 1941, as Appellant erroneously states at page 7 of his brief). Mr. James Gough testified that this discrepancy was the result of an error and that in fact the assessment work for the year in question had been completed on May 13, 1941, the day the affidavit was filed (R. p. 126, line 3).

But this discrepancy in the affidavit of work done could not operate as a forfeiture of the locators' rights in said Little Green Monster Lode Mining Claim, since it has been held that the filing of an affidavit of work done is not a mandatory, but a directory requirement.

In American Mining Law by Ricketts, section 495, page 298, it is stated:

> "The various local mining statutes provide for the making, recording and legal effect of affidavits of annual expenditure. Such laws are not mandatory and neither the failure to record the affidavit nor a mistake therein will work a forfeiture of the claim." Citing *Murray Hill Min. & Mill Co., v. Havenor et al.,* 66 Pac. 762 (Utah).

In the Murray Hill case, the Utah Court in holding that there was no forfeiture of rights because of failure to file the affidavit of work done, said:

> "From the foregoing provisions it is as clear as if it had been explicitly stated that, after a mining claim has been located in conformity with the mining laws and regulations, it is not subject to relocation as long as the locator or his successor in interest continues to perform the labor or make the improvements upon the same required by the United States mining law, and that such a locator, or his successor in interest, has a vested right in such a claim which can only be forfeited by a failure to comply with the conditions mentioned. It follows that the respondent did not forfeit its right by failing to file with the county recorder the affidavit required by section 1500, Rev. St. Utah, and that the trial court did not err in permitting, over the objection of the appellants, the respondent to introduce evidence tending to show that it had performed the labor and made the improvements on its said claims as required by section 2321, Rev. St. U.S."

It is submitted that assessment labor in excess of $100.00 in value was caused to be performed on the Little Green Monster Lode Mining Claim during the assessment year commencing July 1, 1940, and ending July 1, 1941, in good faith for the purposes of holding said mining claim, and was done in full compliance with the mining laws of the United States and the State of Utah.

POINT II

APPELLANT HAD THE BURDEN OF ESTABLISHING, BY CLEAR AND CONVINCING EVIDENCE, THAT THE ASSESSMENT LABOR OR WORK FOR THE ASSESSMENT YEAR IN QUESTION WAS NOT PERFORMED ON THE LITTLE GREEN MONSTER LODE MINING CLAIM. APPELLANT DID NOT SUSTAIN THIS BURDEN OF PROOF.

On May 13, 1941, James W. Gough filed an affidavit of work done which stated that the assessment work for the assessment year in question was performed on the Little Green Monster Lode Mining Claim. This affidavit was recorded May 13, 1941, in Book 347, page 403, records of Utah County, Utah.

Section 40-1-6, Utah Code Annotated, 1953, provides that such an affidavit is prima facie evidence of the facts stated therein. Accordingly, Appellant had the burden of proving that the labor for the assessment year in question was not performed on the Little Green Monster Lode Mining Claim as stated in the affidavit.

The rule as to the burden of proof which the contestant of a mining location must sustain is stated in *Utah Standard Mining Company v. Tintic Indian Chief Mining and Milling Company,* 73 U. 456, 274 Pac. 950, 955:

> "The courts are reluctant to enforce a forfeiture, deeming this class of penalties odious in law; and it is well settled by decisions that forfeiture cannot be established, except upon clear and convincing proof of the failure of the former owner to have performed the labor to the amount

required by law, the burden of proving which rests with the party asserting it."

In the light of the weak and negative character of the testimony of Appellant's witnesses discussed above, and the positive and uncontradicted testimony of Respondent James W. Gough and witnesses Gale Gough, Bernard Welsh and Job H. Winwood, it is respectfully submitted that not only has Appellant failed to satisfy the burden of proof, but in fact the Respondents have proved by clear and convincing evidence that the assessment work for the assessment year in question was, in good faith, caused to be performed on the Little Green Monster Lode Mining Claim by the locators Arthur W. Montgomery and Edwin Over.

As the Trial Court, at page 193 of the record, states:

> "In consideration of the direct testimony of the defendant Gough, corroborated by his son, who worked with him, and by his report to Montgomery and Over, his employers, and their acknowledgment of the work done, by the undisputed fact that some 200 pounds of nodules were taken from the mine, the Court could not say that the negative testimony of the two primary witnesses for the plaintiff, that they had not seen the development, would meet the requirements of the law as to the burden of proof."

POINT III

THE FINDING OF THE TRIAL COURT THAT THE ASSESSMENT WORK FOR THE ASSESSMENT YEAR IN

QUESTION WAS PERFORMED ON THE LITTLE GREEN MONSTER LODE MINING CLAIM IN FULL COMPLIANCE WITH THE MINING LAWS SHOULD NOT BE DISTURBED UNLESS SUCH FINDING IS MANIFESTLY AGAINST THE WEIGHT OF THE EVIDENCE. THE WEIGHT OF THE EVIDENCE IN THIS CASE SUSTAINS RESPONDENTS' CONTENTION THAT THE WORK WAS SO PERFORMED.

In the recent case of *Meagher v. Uintah Gas Company et al.*, (Utah), 255 Pac. 2d 989 (1953), the Supreme Court of Utah reiterated a long standing rule in these words:

> "The trial court's findings will not be disturbed unless manifestly against the weight of the evidence."

The Trial Court, with respect to the issue of whether or not the assessment work on the Little Green Monster Lode Mining Claim was actually done for the assessment year in question, made the following Finding of Fact:

> "That during the assessment year beginning at 12 o'clock meridian on the 1st day of July, 1940, and ending at 12 o'clock meridian on the 1st day of July, 1941, James W. Gough, at the request and for and in behalf of Arthur W. Montgomery and Edwin Over, the then owners of the Little Green Monster Lode Mining Claim, performed labor upon and for the benefit of said claim of a value in excess of One Hundred Dollars ($100.00), in full compliance with the mining laws of the United States and of the State of Utah." (R. p. 31.)

This finding is supported by the positive and uncontradicted testimony of the persons who did the work.

The testimony of Appellant's witnesses is that the witnesses were not in the so-called "old workings" during the assessment year in question and, accordingly, had no opportunity to observe the assessment work performed. Their testimony is based solely on what they observed in the main tunnel and right-hand drift. Their testimony in no way refutes or attemps to refute the testimony of Respondents' witnesses that the assessment work was done in the "old workings" on the Little Green Monster Lode Mining Claim.

POINT IV

THE ARGUMENTS MADE BY APPELLANT IN HIS BRIEF ARE NOT BASED UPON LAW, FACT OR REASON.

(1) At page 8 of his brief, Appellant states:

> "By concealing his (Gough's) alleged work, he led observers to believe that his affidavit was a sham. Mr. Gough should suffer the consequences of his concealment, not the plaintiff."

The legal theory upon which Appellant bases this statement is not clear to Respondents. It suggests that Respondents should not be permitted to show that they did the required assessment work for the assessment year in question as alleged in the affidavit.

Repondents are not aware of any rule of law or equity which would bar such proof. The failure of Appellant to give any reasons or cite any authority in support of this conclusion is evidence of its unsoundness.

(2) At pages 7 and 8 of his brief, Appellant lists four supposed "evidences" of Respondent Gough's "bad faith." They are mentioned here only to point out that they are either an incorrect statement of the facts or that they are irrelevant to the question before this Court.

> a. Appellant asserts that the affidavit signed by Mr. Gough (R. p. 197, Exhibit "A") states that the work was done between April 8, 1941, and June 30, 1941. In fact, the affidavit states that the work was done between April 8, 1941, and June 1, 1941.

As has been previously pointed out, the discrepancy in the dates between which the work was performed was the result of an error by Mr. Gough.

However, the record shows that the work alleged to have been done was in fact performed and the discrepancy in the affidavit obviously does not constitute a valid basis for declaring a forfeiture against Respondents.

> b. Appellant, citing page 139, line 30, of the record, asserts that Mr. Gough stated a falsehood under oath with respect to the time money was received in payment for the work performed.

Mr. Gough affirmatively testified that he received $100.00 for performing the assessment work for the assessment year in question (R. p. 140, line 8).

Respondents fail to see what relevancy the exact time of payment for the work has to the question of whether or not at least $100.00 worth of labor was per-

formed on the Little Green Monster Lode Mining Claim during the assessment year in question. Furthermore, an examination of page 140 of the record casts some doubt on the correctness of Appellant's interpretation of Mr. Gough's testimony.

> c. Appellant asserts that Mr. Gough showed bad faith by performing the assessment work off the right-hand drift rather than in the fissure area at the end of the main tunnel.

This is not evidence of Mr. Gough's bad faith but of his good judgment, for he testified that to perform the work in the fissure area would have been too dangerous and would have involved costly timbering. (R. p. 140, lines 15 to 18, inclusive).

Mr. Montgomery's recommendation that the work be done in the fissure area was not intended as a mandatory direction to do the work there and no place else. Mr. Montgomery only desired that the assessment work for the assessment year in question be done, as is evidenced by the fact that he approved the work as done and thanked Mr. Gough for it (Defendants' Exhibit "3"). It was contemplated that Mr. Gough, who had had fifteen years experience in underground mining (R. p. 122, line 13), would observe the rules of safe mining practice in doing the work, which he did.

> d. Appellant states that Mr. Gough showed bad faith in retaining verasceite specimens. This statement cannot be supported for the record

shows that Mr. Gough was authorized to retain specimens for his collection (R. p. 142, lines 13 to 18).

Furthermore, even assuming for purpose of argument that Mr. Gough had not been authorized to keep specimens, the keeping of them without authority could have no bearing on the question of good faith performance of assessment work in compliance with the mining law, which is the question before this Court. The only bad faith in such an assumed situation would be that involved in the breach of a fiduciary relationship, which would be of no concern to third parties.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the Findings of Fact and Conclusions of Law and the Decree and Judgment of the Trial Court should be sustained.

Respectfully submitted,

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